Office - Supreme Court, U.S.
FILED
AUG 2 1957
JOHN T. FEY, Clerk

No. 191

In the Supreme Court of the United States

October Term, 1957

JOSEPH FRANK, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

CHARLES K. RICE,
Assistant Attorney General,

JOSEPH M. HOWARD,
LAWRENCE K. BAILEY,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute Involved	2
Statement	2
Argument	6
Conclusion	11

CITATIONS

Cases:

Beard v. *United States*, 222 F. 2d 84, certiorari denied, 350 U.S. 846	9
Ford v. *United States*, 273 U. S. 593	7
Gila Valley Ry. Co. v. *Hall*, 232 U. S. 94	7
Gleckman v. *United States*, 80 F. 2d 394, certiorari denied, 297 U. S. 709	9
Graves v. *United States*, 191 F. 2d 579	9
Himmelfarb v. *United States*, 175 F. 2d 924, certiorari denied, 338 U. S. 860	8
Holbrook v. *United States*, 216 F. 2d 238, certiorari denied, 349 U. S. 915	9
Holland v. *United States*, 348 U. S. 121	11
Kirsch v. *United States*, 174 F. 2d 595	9
Malone v. *United States*, 94 F. 2d 281, certiorari denied, 304 U. S. 562	9
Montgomery v. *United States*, 203 F. 2d 887	7
Powers v. *United States*, 223 U. S. 303	8
Steele v. *United States*, 267 U. S. 505	7
Stinnett v. *United States*, 173 F. 2d 129, certiorari denied, 337 U. S. 957	9
Turner v. *United States*, 222 F. 2d 926, certiorari denied, 350 U. S. 831	8
United States v. *Achilli*, 234 F. 2d 797, affirmed, 353 U.S. 373	8
United States v. *Block*, 88 F. 2d 618, certiorari denied, 301 U. S. 690	8
United States v. *Burdick*, 214 F. 2d 768, certiorari denied, 350 U. S. 831	8
United States v. *Heitner*, 149 F. 2d 105, certiorari denied, *sub nom. Cryne* v. *United States*, 326 U. S. 727	8
United States v. *Lipshitz*, 132 F. Supp. 519	8

Cases—Continued

	Page
United States v. *Venuto*, 182 F. 2d 519	9
Warszower v. *United States*, 312 U. S. 342	10
Wilson v. *United States*, 162 U. S. 613	8
Zacher v. *United States*, 227 F. 2d 219, certiorari denied, 350 U. S. 993	8

Statute:

Internal Revenue Code of 1939, Sec. 145(b) (26 U.S.C. 1952 ed., Sec. 145(b))	2, 3

In the Supreme Court of the United States

October Term, 1957

No. 191

JOSEPH FRANK, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 32-37) is not yet reported. The two opinions of the District Court, the one denying a motion to suppress evidence (R. 91a-94a), and the other denying a motion for a new trial (R. 382a-393a), are also unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 15, 1957. (Pet. 38.) The petition for a writ of certiorari was filed on June 13, 1957. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether a revenue agent instituting an examination of a taxpayer's income tax returns is required to warn the taxpayer at the outset that the investigation may result in criminal prosecution.

2. Whether the evidence was sufficient to support the verdict.

3. Whether a chart summarizing the Government's analysis of petitioner's bank deposits was properly admitted in evidence.

STATUTE INVOLVED

Internal Revenue Code of 1939:

> Sec. 145. PENALTIES.
>
> * * * * *
>
> (b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.* Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.
>
> * * * * *

(26 U.S.C. 1952 ed., Sec. 145.)

STATEMENT

On March 9, 1955, petitioner was indicted in the United States District Court for the Western District

of Pennsylvania for wilful attempted evasion of a large part of his income taxes for the year 1948, in violation of Section 145(b) of the Internal Revenue Code of 1939. The amounts of net income and tax due, as reported and as corrected, are as follows (R. 4a):

	Reported		Corrected	
	Income	Tax	Income	Tax
1948	$6,433.89	$657.70	$25,180.61	$5,536.24

Petitioner was convicted after an eight-day jury trial (R. 376a), and on December 11, 1956, he was sentenced to eighteen months imprisonment and fined $2,500 (R. 393a-394a).

Prior to trial, petitioner filed a motion (R. 4a-13a) asking that certain books and records obtained from him by revenue agents during their investigation, and certain admissions made by him to them, be suppressed as evidence. He alleged that this evidence had been obtained by fraud and misrepresentation on the part of the agents, without a warning to him that a criminal investigation was under way, and without his voluntary consent. He further alleged that Revenue Agent Cornell, who first contacted him, said that he had come to make "a routine audit" to ascertain petitioner's "correct civil liability". (R. 6a.) There was an extended hearing on the motion (R. 25a-90a), at which Agent Cornell testified that he told petitioner at the outset that he was conducting a "routine investigation" to determine his "correct tax liability" (R. 48a). He denied that he had assured petitioner that he had come to ascertain his correct "civil" lia-

bility. (R. 55a.) Furthermore, it was undisputed that petitioner consulted with his accountant before he turned anything over to the agent. (R. 48a-49a, 77a-78a, 85a.) Petitioner testified that Agent Cornell told him at the first contact that he was making a "routine check" and that he had "nothing to worry about". (R. 77a, 78a).) The District Court found as a fact that there had been no representation to petitioner that "only civil liability was contemplated" in the investigation (R. 92a), and the motion was denied (R. 94a).

The evidence to support the verdict may briefly be summarized as follows:

Petitioner's income tax returns for the years prior to 1948 frequently reported income from "sporting enterprises" (R. 173a-175a, 182a), and he admitted to the agents that gambling had been one of the sources of his income since January 1, 1945 (R. 222a-223a, 228a). However, he kept only fragmentary records of his gambling income, which he never showed to the accountant who prepared his returns and which he did not retain. (R. 182a-183a, 223a-224a, 241a.) Most of petitioner's reported income for the year involved in this case, 1948, came from a vending machine partnership, the books of which appeared, on the surface, to be in proper order. (R. 147a, 153a, 248a.) There was, however, some evidence to indicate that he received unreported income during 1948 from a pinball machine business. (R. 235a, 293a-294a.)

During their investigation, the revenue agents discovered that petitioner had deposited substantially

more funds in his bank accounts during 1948 than the income he had reported in his returns for that year, and they thereupon set about to make an analysis of the deposits. (R. 242a.) From the total amounts deposited, the agents carefully eliminated all sums which had actually been reported in petitioner's return and all sums which could possibly have been non-income items, such as loans, reimbursed expenses and repayments of capital. (R. 204a-212a.) To the remaining amount, the agents added a few nondeductible cash expenditures which had not come from any of petitioner's bank accounts. (R. 202a-204a.) As a result of this calculation, the agents concluded that petitioner had failed to report income in the amount of $18,746.72 for the year 1948. (R. 212a.) Similar calculations for the preceding years revealed unreported income in the following amounts (R. 216a-222a):

1945	$10,692.79
1946	11,377.43
1947	15,184.61

At an early stage of the investigation petitioner told the agents that practically all the cash he had on hand as of January 1, 1945, was approximately $10,000 in the bank. (R. 225a.) He also said that he had a safe deposit box but had never kept any cash in it. (R. 227a.) Four months later he submitted a net worth statement in which he claimed $50,000 in currency as of January 1, 1945, and he told the agents that this had been accumulated between 1940 and 1944. (R. 228a-231a.). The following month, he said that some of this currency had been acquired

during the 1930's, but became confused when it was pointed out that he had worked for the W. P. A. (R. 238a.) He then claimed that a considerable portion of the $50,000 had been kept in his safe deposit box. (R. 236a.) He said, however, that he had kept most of the money in a strong box at home and that he had kept a running record of it, but he could neither produce the record nor give an account of the expenditure of the cash. (R. 237a-239a.)

There was other evidence to discredit the alleged $50,000 cash hoard. From 1920 to 1937, petitioner either filed nontaxable returns or no returns at all. For the year 1941, he owed income taxes in the amount of $4,800, but the Government had to file a lien to obtain payment and the amount was not paid in full until late in 1944. In 1945, he cashed $1,200 worth of small bonds, and in 1945 he borrowed substantial sums from his vending machine partnership. Upon the basis of the evidence as to the funds available to petitioner, the Government showed that, in order to have accumulated $50,000 in cash by the beginning of 1945, he would have had to support himself, his wife and his two children for eighteen years on approximately $8 a week. (R. 246a-247a.)

ARGUMENT

1. Petitioner's position in the trial court was that he had been deliberately misled by Revenue Agent Cornell into believing the investigation of his returns to be a purely *civil* matter. In the motion to suppress, petitioner alleged that Cornell stated that his purpose was to ascertain the correct civil liability (R.

6a), and at the hearing petitioner testified that Cornell assured him that he had nothing to worry about (R. 77a). Cornell denied having given any such assurances. Furthermore, it was undisputed that petitioner consulted his accountant before he gave Cornell anything and that there was no representation to the accountant that a purely civil audit was contemplated. (R. 77a-78a, 90a.) The accountant advised petitioner to cooperate fully with the agent because "we felt that there was nothing to hide and that the taxpayer had divulged all his income". (R. 87a.) The District Court decided the testimonial conflict as to misrepresentation adversely to petitioner. Moreover, the jury implicitly reached the same conclusion, for the trial judge, in an excess of caution, instructed it to disregard any evidence it found to have been obtained by misrepresentation, an evidentiary issue which he had himself already determined.[1] (R. 374a-375a.) It must be taken as settled, then, that what Cornell said in his first conversation with petitioner was that he was making a routine investigation to determine petitioner's correct tax liability. In view of the fact that petitioner took the precaution to consult his accountant and was advised to cooperate, the District Court and the jury were amply justified in concluding that petitioner could not have been, in fact, misled by this introduction.

Petitioner is, therefore, driven to the contention in

---

[1] See *Ford* v. *United States*, 273 U. S. 593, 605; *Steele* v. *United States*, 267 U. S. 505, 511; *Gila Valley Ry. Co.* v. *Hall*, 232 U. S. 94, 103.

this Court (Pet. 20-27) that, whenever a revenue agent suspects a criminal violation (or a possibility of one) when he begins an investigation, his conduct is *per se* fraudulent and misleading if he does not warn the taxpayer of the possibility of prosecution. It is, however, well settled that criminal investigators, and revenue agents in particular, are not required to issue any such warning. *United States* v. *Achilli*, 234 F. 2d 797, 805 (C.A. 7th), affirmed on other issues, 353 U. S. 373; *Turner* v. *United States*, 222 F. 2d 926, 930-932 (C.A. 4th), certiorari denied, 350 U. S. 831; *United States* v. *Burdick*, 214 F. 2d 768 (C.A. 3d), certiorari denied, 350 U. S. 831; *Montgomery* v. *United States*, 203 F. 2d 887 (C.A. 5th); *Zacher* v. *United States*, 227 F. 2d 219 (C.A. 8th), certiorari denied, 350 U. S. 993.[2] It must be apparent to any taxpayer that a "routine investigation of his tax liability" may lead to criminal proceedings, unless he is specifically advised that only his civil liability is involved. Both the District Court and the jury found that there had been no such assurance here.

2. Petitioner's attack upon the sufficiency of the Government's evidence (Pet. 27-30) falls with the

---

[2] See also *Wilson* v. *United States*, 162 U. S. 613, 621-624; *Powers* v. *United States*, 223 U. S. 303, 312-314; *Himmelfarb* v. *United States*, 175 F. 2d 924, 938 (C.A. 9th), certiorari denied, 338 U. S. 860; *United States* v. *Heitner*, 149 F. 2d 105, 107 (C.A. 2d), certiorari denied *sub nom. Cryne* v. *United States*, 326 U. S. 727; *United States* v. *Block*, 88 F. 2d 618, 620-621 (C.A. 2d), certiorari denied, 301 U. S. 690. The only case cited by petitioner which gives any support to his position at all is *United States* v. *Lipshitz*, 132 F. Supp. 519 (E. D. N. Y.).

assumption upon which it is based. Petitioner assumes that the Government attempted to establish the unreported income by proof of unexplained increases in his net worth. Actually, the Government relied principally upon an analysis of petitioner's bank deposits.

The courts of appeals have long recognized that the existence of current income may be inferred when the Government shows that the taxpayer was engaged in an income-producing business and that he made periodic deposits in bank accounts under his control, and when the revenue agents have thoroughly analyzed these deposits and have made a reasonable effort to exclude all non-income items such as redeposits, transfers between accounts, loans, gifts, or deposits from a prior accumulation. *Gleckman* v. *United States*, 80 F. 2d 394, 399-400 (C.A. 8th), certiorari denied, 297 U. S. 709; *United States* v. *Venuto*, 182 F. 2d 519, 521 (C.A. 3d); *Beard* v. *United States*, 222 F. 2d 84 (C.A. 4th), certiorari denied, 350 U. S. 846; *Stinnett* v. *United States*, 173 F. 2d 129 (C.A. 4th), certiorari denied, 337 U. S. 957; *Holbrook* v. *United States*, 216 F. 2d 238 (C.A. 5th), certiorari denied, 349 U. S. 915; *Kirsch* v. *United States*, 174 F. 2d 595, 601 (C.A. 8th); *Graves* v. *United States*, 191 F. 2d 579 (C.A. 10th). The nature of taxpayer's business and the periodicity of his deposits support the inference that the deposits represent current income and not funds dribbled into the accounts from some prior cash accumulation. *Malone* v. *United States*, 94 F. 2d 281, 286, 287-288 (C.A. 7th), certiorari denied, 304 U. S. 562.

In this case, the agents discovered that for a period of at least four years petitioner's bank deposits considerably exceeded the amounts of income reported in his returns (*supra*, pp. 4-5), and there was evidence from which the jury could properly have concluded that he was engaged in three income-producing businesses during 1948, gambling,[3] the vending machine partnership, and the pinball operation (*supra*, p. 4). The agents carefully analyzed the deposits and excluded all which could possibly have been non-income items (*supra*, p. 5). Then, in an effort to determine what explanation petitioner might have, they asked how much cash he had as of January 1, 1945, and were told that he had practically none except $10,000 in the bank (*supra*, p. 5). His subsequent claim of $50,000 was, as has been shown (*supra*, pp. 5-6), completely discredited.

There was, therefore, evidence of excess bank deposits, and evidence of sources from which it could reasonably be inferred these deposits derived. Since the Government relied on proof of periodic bank deposits, the establishment of a net worth starting point was unnecessary. However, it is clear that the net worth statement which was used in corroboration of the bank deposits proof did have an adequate starting point. The only real dispute on this was whether petitioner had $10,000 or $50,000 in currency on January 1, 1945, and the evidence on that score completely discredited petitioner's claim.

---

[3] Petitioner's admissions in this respect were sufficiently corroborated by his prior returns. *Warszower* v. *United States*, 312 U.S. 342, 347.

3. Petitioner also complains (Pet. 30) because the trial judge allowed the jury to see a chart (R. 377a-379a) showing the Government's bank deposit computations. However, petitioner's counsel consented to it at the time the chart was submitted to the jury (R. 325a-326a), and the jury was properly instructed as to the use they could make of such a chart (R. 372a). *Holland* v. *United States*, 348 U. S. 121, 128.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

JOSEPH M. HOWARD,
LAWRENCE K. BAILEY,
Attorneys.

AUGUST, 1957.

☆ U. S. GOVERNMENT PRINTING OFFICE 1957 43435° 149